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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 161

LIGGETT AND MYERS TOBACCO CO., *Petitioner,*

vs.

THE UNITED STATES.

No. 162

THE COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

vs.

THE UNITED STATES.

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

vs.

THE UNITED STATES.

PETITION FOR REHEARING.

Come now the above-named appellees and present this petition for a rehearing of the above entitled cases and in support thereof respectfully show:

I.

THE DECISION IS BASED UPON THE CONCLUSION THAT THE TAX IN QUESTION IS LAID UPON MANUFACTURE UPON THE INCORRECT ASSUMPTIONS THAT PAYMENT ALONE IS DEFERRED UNTIL SALE OR REMOVAL—NOT THE INCIDENCE OF THE LEVY; THAT THE ABSENCE OF A PRICE MEASURE INDICATES THE TAX TO BE ON MANUFACTURE; THAT THE ADMINISTRATIVE PROVISIONS OF THE TAXING ACT INDICATE CONGRESS REGARDED THE EXCISE AS ONE ON MANUFACTURE AND THAT THERE IS NO INDICATION OF A PURPOSE TO MAKE SALE OR REMOVAL THE BASIS OF THE INCIDENCE OF THE TAX.

II.

THE DECISION IS BASED UPON THE INCORRECT ASSUMPTION THAT THE TAX IN QUESTION IS SIMILAR TO THE TAXES INVOLVED IN CORNELL v. COYNE, AMERICAN MFG. CO. v. ST. LOUIS AND WHEELER LUMBER B. & S. CO. v. UNITED STATES.

III.

THE DECISION IS BASED UPON THE INCORRECT ASSUMPTION THAT THE TAX IN QUESTION ONLY REMOTELY BURDENS THE COMMONWEALTH OF MASSACHUSETTS.

IV.

THE DECISION INVOLVES POTENTIALLY THE PROTECTION OF THE SOVEREIGNTY NOT ONLY OF THE COMMONWEALTH OF MASSACHUSETTS BUT OF EVERY STATE IN THE UNION.

I.

The decision is based upon the conclusion that the tax in question is laid upon manufacture upon the incorrect assumptions that payment alone is deferred until sale or removal—not the incidence of the levy; that the absence of a price measure indicates the tax to be on manufacture; that the administrative provisions of the Taxing Act indicate Congress regarded the excise as one on manufacture and that there is no indication of a purpose to make sale or removal the basis of the incidence of the tax.

This case involved the question whether the tax imposed under section 401 (a) of the Revenue Act of 1926, c. 27, which reads as follows:

> "Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal revenue taxes now imposed thereon by section 401 of the Revenue Act of 1924, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof."

could constitutionally apply to tobacco sold by the manufacturer to The Commonwealth of Massachusetts for use in institutional treatment in an insane hospital owned and operated at public expense by the Commonwealth.

The claim for refund to the Commissioner of Internal Revenue was denied by him on the ground that the tax was a tax on "removal." Before the Court of Claims it was also contended by the Federal Government that the maintenance of the insane hospital was not such a governmental activity as was entitled to immunity from Federal taxation. The Court of Claims found it unnecessary to pass upon the "removal" contention and sustained the Commissioner's action on the ground that the insane hospital was not an instrumentality with respect to the maintenance of which Massachusetts was entitled to immunity. The Supreme Court having issued a writ of certiorari, the Federal Government in its brief on the merits also suggested the further defence that the tax is upon manufacture, the time of collection simply being deferred until sale or removal for consumption or sale, and hence that it imposes no direct burden upon the purchaser. This ground of defence was perhaps not seriously apprehended nor adequately argued by the petitioners. It is understood to be the ground upon which the Supreme Court affirmed the judgments of the Court of Claims. The Court apparently construes the tax to be on manufacture solely and having adopted such a construction applies the rule enunciated in *Cornell* v. *Coyne,* 192 U. S. 418. It is submitted that analysis will reveal that it was not the congressional intent so to lay the tax. The statute certainly does not use the natural and appropriate language for laying a tax which is to have its incidence in manufacture. The taxing clause lays the tax on tobacco whether manufactured in the United States or imported into the country "and hereafter sold by the manufacturer or im-

porter, or removed for consumption or sale." In the Codification of Internal Revenue Laws submitted to the Joint Committee on Internal Revenue Taxation by its staff January 30, 1933, is a note to the taxing clause here involved indicating that the word "hereafter" is omitted from its draft as "surplusage." Whether the placing of the word "hereafter" be considered significant or not, the word "and" is conjunctive and precludes the possibility of contention that Congress employed apt language to express an intent to lay a tax on manufacture alone. If, as suggested in one of the three briefly stated reasons of this Court in support of its conclusion, it were the intent of Congress to make the tax have its incidence in manufacture or importation, as the case might be, simply deferring the payment to mitigate the burden, Congress would naturally have used the word "when," not "and." Moreover, if it were the intent merely to defer *payment,* appropriate language to defer payment alone would naturally have been adopted. The taxing clause hereinbefore quoted is the only clause imposing the tax. If this clause does not impose the levy, there is no levy. This clause clearly is so worded as not only to "defer" the payment of the tax but the very levy itself. The statute says "levied, collected and paid." All depend on the happening of certain contingencies and the happening of those contingencies is equally essential with respect to levy, collection and payment. Until those contingencies including sale or removal for consumption or sale have occurred, there is no levy, no right to collect nor any requirement to pay. Now it is clear that the type of tobacco being subjected to levy is manufactured tobacco whether manufactured in this country or imported from abroad. U. S. C., Tit. 26, Sec. 760, lays a tax on leaf tobacco sold, removed or shipped by dealers equal to the tax laid on manufactured tobacco only for violation of certain statu-

tory provisions calculated to insure collection of the tax on manufactured tobacco. Therefore tobacco of the class taxed, however it comes into being, whether by manufacture within the confines of the nation that has the jurisdiction to tax on manufacture or by manufacture abroad where Congress has no power to levy on manufacture, is subjected to one and the same levy upon the happening of certain contingencies. There is no element of contingency truly dependent upon the character of the origin of the tobacco. All manufactured tobacco, irrespective of where it was manufactured, is subject to the tax upon the happening of definite contingencies and not until the happening of such contingencies. These contingencies are sale or removal for consumption or sale. The distinction is amply manifest in connection with a change of rate in the tax. If that which causes the incidence of the tax is manufacture and manufacture occurs prior to the effective date of the change in rate, the earlier rate obtains even though the tobacco remains unsold. If, on the other hand, that which causes the incidence of the tax is sale, then even though the tobacco was manufactured or imported prior to the effective date of the act, it would bear the new rate if sold after the effective date. In other words the issue is not one of mere deferring of the time of payment. It involves the character and existence of the levy itself. The placing of the word "hereafter" before the word "sold" rather than before the word "manufactured" has significance even though after lapse of time the word itself may have been deemed to have lost its usefulness. At the time of enactment when it would be necessary to indicate whether the tax was to apply to tobacco *manufactured* after enactment or *sold* after enactment, it is evident Congress meant to make clear that the tax applied to tobacco *sold* after enactment. The importance of such a distinction was involved in the case of *Patton* v. *Brady*, 184 U. S.

608, which though not referred to in the opinion of this Court, is believed to have an important bearing. In that case, in providing ways and means to finance the Spanish-American War, Congress imposed in lieu of a six cent tax on tobacco and snuff manufactured and sold or removed for consumption or use, a twelve cent tax upon all tobacco and snuff, however prepared, manufactured, and sold, or removed for consumption or sale. The Act further provided: "And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all articles enumerated in this section which were manufactured, imported and removed from factory or custom house before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this act held and intended for sale by any person, a tax equal to one half the difference between the tax already paid on such articles at the time of removal from the factory or customhouse and the tax levied in this act upon such articles." In its opinion in that case the Supreme Court at Page 617 says:

> "Ever since the early part of the Civil War there has been a body of legislation, gathered in the statutes under the title INTERNAL REVENUE, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries. The first of these acts, passed on July 1, 1862 (12 Stat. at L. 432, chap. 119), in terms provided for 'the collection of internal duties, stamp duties, licenses, or taxes imposed

> by this act,' and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to 6 cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish War, increased the charge to 12 cents a pound, specifying distinctly that it was to be 'in lieu of the tax now imposed by law.' Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term."

The Court then recites several definitions of an excise and finds the tax involved in the case to be an excise and not a property tax. It holds that the power to increase the rate resides in Congress until the tobacco passes to consumption. Hence even though the tobacco involved had passed from the hands of the manufacturer and had paid a six cent tax, Congress could constitutionally increase the excise to twelve cents and collect the difference from the person still holding the tobacco for sale. It is to be noted that the issue considered in the *Brady* case involved primarily the constitutional power of Congress to do what it did do —namely, levy an excise not only after manufacture was complete but subsequent in the particular case to sale by the manufacturer—not what the Congress by its act did do. Apparently neither the parties nor the Court considered that the tobacco tax was in fact laid (irrespective of Congressional power to levy) on manufacture. It is obvious, moreover, that if the tax in question had been considered to be a tax on manufacture, nothing happened after the 1898 act became effective to cause it to apply to the tobacco in question. That particular tobacco had passed

out of the hands of the manufacturer. In other words there the words "and sold, or removed for consumption or sale," clearly had to be given some other significance than *when* sold, or removed for consumption or sale. The act of sale or removal had to be the foundation of the tax itself. It could not be considered a mere deferment of the time when the excise on manufacture might be paid. That it was in lieu of a line of tobacco taxes, all, as pointed out by the Court, of the same general character, is persuasive as to the intent and purpose of that line of taxes both before and subsequent to the particular levy considered in the *Brady* case. To be sure later taxes as under the law involved in the instant cases provide for impingement of the excise on first sale—that is upon sale by the manufacturer or importer as the case may be, but this indicates no intent to change the character of the tax to such extent as to cause it to have its incidence in manufacture. It is a common practice in connection with taxes on or measured by sales and intended to bear upon the consumer to lay the tax on or with respect to first sale in order to insure and simplify collection. Many, if not most, taxes with respect to the sale of gasoline are so levied.

This distinction between a tax incident upon manufacture and a tax incident upon sale or removal was early recognized by the Supreme Court in *Pennington* v. *Coxe*, 2 Cranch 33:

> "Under date of June 5, 1794, the Third Congress passed an act numbered as Chapter 51 which provided as follows:
>
> 'SECTION 1. And be it further enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the 30th day of September next, there be levied, collected and paid, upon all snuff, which, after that day, shall be manufactured for sale, within the United

States, at any manufactory, for every pound of snuff, eight cents.

'SECTION 2. And be it further enacted, That from and after the said 30th day of September next, there be levied, collected and paid, upon all sugar which shall be refined within the United States, a duty of two cents per pound.' "

In *Pennington* v. *Coxe,* the court held that although sugar was refined prior to the repeal of the Act of 1794 in April, 1802, it was not subject to tax, it not being removed until after that day. In disposing of the case, the Chief Justice points out at page 60 that

> "Within respect to refined sugars no duty can ever be demanded, unless the demand be predicated on the fact of removal."

And again at page 62, he says:

> "The refiner of sugars never hazards the payment of the duty himself, because he is never to pay it until they are presumed to be sold, by being sent out of the building in which they have been refined. In most other cases it has been deemed sufficient to secure this object by a credit, which will allow time for the sale of the article, after which the duty must be paid whether the article be sold or not. But in the case of refined sugars, the refiner never can be liable for the duty, but on a fact which is considered, and properly considered, as evidencing a sale, after which a credit for the collection of the duty is still allowed him. With respect to the refiner of sugars, then, it must, on an inspection of the act, emphatically be said that the legislature designed him to collect the duty from the consumer, but never to pay it from the manufacture; that the tax should infallibly be imposed on expense, and never on labor."

Similarly under the law imposing the tax in the instant cases, the manufacturer or importer never hazards the pay-

ment of the tax himself, because he is never required to pay it until the tobacco is either actually sold or is "presumed to be sold" by being removed from the bonded premises. There exists no obligation to affix stamps until sale or removal. If the tobacco is destroyed by fire after manufacture but before sale or removal there is no tax liability.

The Supreme Court in the instant cases states that "the administrative provisions of the taxing Act indicate that Congress regarded it as an excise on manufacture." Just what administrative provisions point to this conclusion are not specifically indicated. The Federal Government in its brief suggested a number of administrative provisions as bearing on the point. Admittedly each and every one of these provisions is calculated to insure payment of the tax upon all tobacco that shall pass from the hands of the manufacturer by way of sale or for consumption or sale except in instances where the tobacco is to be exported but not one of them indicates any purpose that the tax shall have its incidence in manufacture or at any time prior to sale or removal. The entire text of the Federal law relating to the taxation of tobacco has been carefully examined and it is believed that it no where contains any provision, administrative or otherwise, that is inconsistent with the view that the tax has its inception at the time of sale or removal and not before. On the contrary certain provisions having reference to import duties and to exports, as more fully referred to under heading II, at least tend to indicate the tax was aimed neither at importation nor manufacture. So far as administrative *action* is concerned, it would appear that the tax has been treated rightly or wrongly as having its incidence in removal. This Court in its opinion in the instant cases says "Apparently the practice is to affix the required stamps without regard to sale or removal." It is believed that this is an incorrect assumption. The record

does indicate the established procedure of the Department of Internal Revenue was to require that the stamps be affixed before the tobacco was removed from the factory, but this does not indicate disregard of removal in connection with affixation. It is not found that the record indicates the practice apart from this requirement but it is believed that in fact the practice does have a distinct regard for sale or removal. Although it does not appear in the record, it is the fact that in response to an inquiry, the Liggett & Myers Tobacco Co. wrote the Collector of Internal Revenue under date of May 14, 1934, with respect to the stamping of the tobacco involved in the instant cases a letter containing this paragraph:

> "The stamps on the boxes containing this tobacco were cancelled in January, 1932, and pasted on the packages on January 8, 1932, one day prior to the shipping date, in order to allow them to dry thoroughly before shipping."

It is believed that no such practice as the Court assumes in fact exists.

A third reason indicated by this Court, and it is believed the only other reason stated in the opinion, for considering that the tax in the instant cases was on manufacture is that "The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." It is submitted that in so far as the absence of a price measure is relied on as a positive indication that the tax was intended to be on manufacture alone, it is unwarranted. Taxes on manufacture are not infrequently measured by receipts from sales and certainly the weight of the article sold is not so customarily adopted as the orthodox measure for taxes on manufacture as to afford a basis for a presumption that when the measure of a tax is in terms of pounds sold it should be inferred to be a tax on

manufacture. Indeed the use of such a measure would probably be found to be infrequent as compared to other means of admeasuring taxes on manufacture. And in so far as the absence of a price measure is relied on to negative the contention that the tax does have its incidence in sale or removal for consumption or sale it would seem equally without warrant. The most common method of measuring taxes upon the sale of gasoline is number of gallons, not price. In the case of *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, in which it was held that the tax would not apply to gasoline sold the United States, the measure of the tax was number of gallons, not price. This was also true of the tax involved in *Graves* v. *Texas Co.*, 298 U. S. 393. It is true that in the case of *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, in construing a statute so ambiguous in wording as apparently to leave some room for doubt as to whether it was the intent to levy tax on manufacture alone or on manufacture *and* sale, or on sale alone, this Court relied upon a number of different reasons for reaching the conclusion that the levy was intended to be upon sale and among the reasons it was suggested that the price measure indicated an intent to levy upon sale rather than upon manufacture, doubtless in the thought that the price measure applies more appropriately to a tax laid on sales than to a tax laid on manufacture. But there was no intimation that a measure other than price was not equally appropriate to admeasure a tax impinging at the time of sale. In other words the price measure might be inferred to be less appropriate as a measure for a tax on manufacture than for a tax on sale, but it would not follow that number of pounds of an article sold or number of gallons sold would be an unnatural method of measuring a tax on the sale of an article. As before pointed out, the most common measure for a tax on the sale of gasoline is num-

ber of gallons, not price. It is also believed that the more common measure for taxes on the sale or privilege of sale of tobacco products in the various states having such taxes is weight or units, not price. Of eighteen states listed in "Tax Systems of the World" as having taxes on the sale or privilege of selling cigarettes and tobacco, eleven follow the weight or unit measure as against seven using price. Both the *Indian Motocycle* case and the *Panhandle Oil* case make clear that the fact that the tax applies only to first sale, or that the tax is collected from the manufacturer, or seller, does not make the burden of the tax so remote as to make the burden indirect as applied to the purchaser. In the *Indian Motocycle* case the Court says at page 574:

> "Counsel for the Government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation. Importation, as such, already was otherwise taxes, c. 356, § 1, par. 369, 42 Stat. 858, 885, U. S. S., Title 19, § 121, par. 369, and in our opinion the words relied on fall short of expressing a purpose to subject it to a further tax."

In these respects apart from the price measure there is close similarity to the tax levied in the instant cases. The taxing clause involved in the Indian Motocycle case provided

that "there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased." It is believed that the language employed in the taxing clause in the instant cases is at least as clear in its intent to levy a tax having its incidence in sale or removal for consumption or sale and not before such sale or removal as was the indication in the *Indian Motocycle* case that sale or lease provided the incidence of the levy. It is respectfully submitted that in the light of the language of the taxing act, the Congressional debates in 1794 prior to the enactment of Chapter 51 of that year, its history, its administrative provisions and the decisions of this court interpretive of it, the levy is not one upon manufacture as was found to be the case in *Cornell* v. *Coyne* but a tax which had no incidence until sale or removal.

II.

The decision is based upon the incorrect assumption that the tax in question is similar to the taxes involved in Cornell v. Coyne, American Mfg. Co. v. St. Louis and Wheeler Lumber B. & S. Co. v. United States.

In the case of *Cornell* v. *Coyne*, 192 U. S. 418, the taxing clause provided as follows:

> "That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound." (29 Statutes at large 253, Chapter 337, Section 9.)

Here the taxing clause places the tax on manufacture alone. The levy itself as contained in this clause is not made to depend on sale or removal as in the case of the tobacco tax.

The soundness of the conclusion that the construction of this clause is unaffected by the provision elsewhere in the statute which permits by reason of the medium of payment provided deferring the payment until sale or removal, it is not necessary here to question. For reasons hereinbefore set forth in the case of the excise with respect to tobacco involved in the instant cases, the taxing clause itself is susceptible of no other construction than that sale or removal is essential to the incidence of the levy itself. In the case of *Cornell* v. *Coyne*, the statute making no provision for exemption of cheese exported, it was contended that the tax violated the fifth paragraph of Section 9, Article 1, of the Constitution. The court construing the tax to be on manufacture finds no viloation. The unlikeness of the tobacco tax and the filled cheese tax in this aspect is significant. In the tobacco tax law Congress made express provision for exemption of tobacco sold or removed for export.

Again in the case of *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, the unlikeness of the taxing clause is still more evident. In this case a statute of Missouri authorized cities to license, tax, and regulate for local purposes the occupations of merchants and manufacturers, and to graduate the amount of annual license imposed upon them in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date. Pursuant to this authority the city, by the ordinance in question, required every manufacturer in the city, before doing business, to take out a license and to pay a license tax on each $1,000 of sales made. The *State* supreme court construed this tax as one upon the privilege of manufacturing in the city and measured by the sales of the product there manufactured whether the goods were removed to another location or not. The United States Supreme Court under the usual rule adopted this construction of the State court of its own laws, saying "As a matter of construction, this,

upon familiar principles, is conclusive upon us." As so construed, the United States Supreme Court found the ordinance constitutional and not violative of either the interstate commerce clause or the due process clause.

Accordingly:

1. The case is in no way a decision of the United States Supreme Court on the point of construction for which purpose it is cited by the Government in the instant cases.

2. The language and context of the ordinance and statute is so entirely different from that in the Federal act imposing the tobacco taxes in the instant case as to afford no parallel whatsoever.

3. In the *American Mfg. Co.* case the imposition is clearly a "license tax" on the occupation of manufacture. The express language of the statute authorizing the local ordinance so states. It adopts *as a measure* of the tax the sales of the product manufactured in the city subject to the ordinance. Any other reasonable measure for the license might have been adopted. This Court finds that where the measure is limited to sales of the product manufactured in the jurisdiction having the right to impose a license tax it is reasonable and not violative of constitutional provisions. In contrast to this type of imposition, the imposition in the instant cases is clearly upon all tobacco irrespective of origin, whether manufactured in the United States or imported into it. No tobacco can exist that is not subject to the excise if it is sold or removed for consumption or sale except as the statute provides for exemption as where the tobacco is exported for consumption outside the United States. If the tobacco taxes had been aimed at manufacture, it would seem unlikely that imported tobacco would have been subjected to identically the same excise at identically the same rate and the origin of the tobacco made an immaterial factor. If the statute were to be deemed to be

aimed at manufacture it would also have to be deemed to be aimed at importation. But the very section that levies the tax provides that it is in addition to levies on importation. It is not reasonable to suppose that it was the intent of Congress to strike twice at the same act. As pointed out in the *Brady* case (*ante*) the power to levy an excise continues until the article reaches the consumer and it seems reasonable to suppose that it is an act subsequent to importation that is here being excised. Likewise, if the excise were aimed at manufacture, it would be unreasonable to measure it only by domestic consumption and exempt exports. The Federal Government in its brief quotes from language in the case of *American Mfg. Co.* v. *St. Louis* to the effect that "A somewhat similar method of postponing payment has been pursued for many years by the Federal Government with respect to the internal revenue tax upon distilled spirits." This Court appears to have felt the influence of the contention for it says in its opinion in the instant case: "True the limit of time for making payment is when the product is sold or removed, but this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal." But the tax referred to in the quoted language from the *American Mfg. Co.* case was the tax on distilled spirits, the antecedent of which Chief Justice Marshall went to some pains to distinguish from the tax upon sugars, which in connection with the earliest Congressional levy on any form of tobacco has hereinbefore been discussed.

The case of *Wheeler Lumber Co.* v. *U. S.*, 281 U. S. 572, involved a tax on transportation prior to sale and impinged neither upon sale nor removal for sale or consumption.

III.

The decision is based upon the incorrect assumption that the tax in question only remotely burdens the Commonwealth of Massachusetts.

But it may be said that the case is not to rest upon an issue so narrow as whether the tax is technically a tax on manufacture or a tax on sale or a tax on both,—that the ultimate issue is whether the tax as applied in the instant cases violates the immunity to which The Commonwealth of Massachusetts is entitled. The principle that Federal taxes which impose a direct burden on the States and State taxes which impose a direct burden on the Federal Government cannot be sustained as constitutional seems definitely entrenched. But what constitutes a "direct" burden and when is the burden "indirect"? If the problem were to be approached *de novo* it might seem that the underlying objective is the protection of each member of the dual sovereignty in its own sphere and that if a tax imposed by one sovereignty is of such a nature that there is the strong probability that its burden will ultimately rest on the other, thereby exposing the other sovereignty to the mortal destruction which Chief Justice Marshall long ago perceived was involved in the power to tax, then the threat is not to be permitted even though destruction be not imminent in the particular levy itself. From Marshall's pronouncement it might have seemed reasonable to infer that the heel of Achilles is not even to be bared to the mortal dart. The majority of writers of political economy appear to agree that a tax on manufacture by and large is likely to rest ultimately upon the purchaser of the goods and yet decided cases appear to indicate that this Court has adopted the view that a tax on manufacture is not so perilous to a sover-

eign purchaser of the goods manufactured as to violate the rule of immunity. And there may be considerations that would make exceedingly difficult as a practical matter the adoption of a different view. It seems difficult as a matter of logic, however, to reconcile on grounds other than those of practical expediency the established tenet that if a tax imposes a so-called "direct" burden it is immaterial that it is so trivial in amount as to carry no actual menace to the sovereignty affected thereby on the theory of its potentiality for harm; and to deny protection in the case of taxes said to be "indirect" or "remote" but actually imposing relatively severe burden upon the theory that although admittedly there is strong probability that the burden will in fact carry through to the sovereignty there is at least a chance it will not. If such be the decided law and it would seem that it is, it is submitted that such a conception of "indirectness" or "remoteness" should not be extended to that class of cases where it is a practical certainty that the tax will be directly passed along. The *Panhandle Oil Co.*, the *Indian Motocycle Co.* and the *Graves* cases all indicated that it would not be. If as has been contended the tax in the instant cases does not have its incidence in the manufacture or importation of tobacco but it is only when the tobacco whatever its origin, whether manufactured at home or imported from abroad, is sold or removed for sale or consumption that the tax liability arises; then the tax differs in no material aspect so far as likelihood of passing on of the burden is concerned from the taxes involved in these three cases. In other words the tax has been brought to the door of the first purchaser. The distinction is precisely that pointed out by Chief Justice Marshall in *Pennington* v. *Coxe, ante,* when he distinguished between the tax on spirits, liability for which was incurred upon distillation,

and the tax on sugars, liability for which did not arise until removal. In the one case the distiller "hazards" bearing the tax himself whereas in the other, the refiner of sugars "never hazards the payment of the duty himself, because he is never to pay it until they are presumed to be sold, by being sent out of the building in which they have been refined." The refiner never can be liable "but on a fact which is considered, and properly considered, as evidencing a sale." "With respect to the refiner of sugars, then, it must be said that the legislature * * * designed him to collect the duty from the consumer, but never to pay it from the manufacture; * * *." (Citations appear earlier herein.) In other words where incidence of the liability for the tax is deferred until sale or removal for sale or consumption it is almost a certainty that the tax will be passed on to the buyer. It is submitted therefore that the tax here involved is not essentially different so far as the likelihood of transmission of the tax is concerned from the taxes involved in the *Panhandle Oil Co.*, the *Indian Motocycle Co.*, and the *Graves* cases.

IV.

The decision involves potentially the protection of the sovereignty not only of the Commonwealth of Massachusetts but of every State in the Union.

The importance of the decision is not to be measured in terms of the sums involved in the instant cases, nor in terms of the potential detriment to Massachusetts alone, but extends in its possibilities to all states.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judg-

ment of the Supreme Court of the United States be, upon further consideration, reversed.

Respectfully submitted,

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PAUL A. DEVER,
Attorney General,
By ROGER CLAPP,
Assistant Attorney General,
Attorneys for Petitioners.

Certificate of Counsel.

I, Henry F. Long, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HENRY F. LONG,
Counsel for the Petitioners.